

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO
3 Civil Action No. 25-cv-474-DDD
4 DENVER PUBLIC SCHOOLS,
5 Plaintiff,
6 vs.
7 KRISTI NOEM et al.,
8 Defendants.

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10 REPORTER'S TRANSCRIPT
11 Hearing on TRO
12 -----

13 Proceedings before the HONORABLE DANIEL D. DOMENICO,
14 Judge, United States District Court for the District of
15 Colorado, commencing on the 7th day of March, 2025, in Courtroom
A1002, United States Courthouse, Denver, Colorado.

16 APPEARANCES
17 For the Plaintiff:
18 CLAIR E. MUELLER, STEPHEN A. SNOW, TESS HAND-BENDER, EMILY L.
19 WASSERMAN, BROOKE M. ROGERS, HANNAH McCRORY, and NICHOLAS
20 MOSKEVICH, Davis Graham & Stubbs LLP, 3400 Walnut Street, Suite
700, Denver, CO 80205

21 For the Defendants:
22 KEVIN T. TRASKOS, THOMAS A. ISLER, KATHERINE A. ROSS, and
NICHOLAS A. DEUSCHLE, United States Attorney's Office, 1801
California Street, Suite 1600, Denver, CO 80202

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25 Reported by KEVIN P. CARLIN, RMR, CRR, 901 19th Street, Room
A259, Denver, CO 80294, (303)335-2358

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P R O C E E D I N G S

(Proceedings commenced at 2:03 p.m.)

THE COURT: We are here for a hearing on the plaintiff's preliminary injunction -- a motion for a preliminary injunction in case 25-cv-474, Denver Public Schools versus Noem et al. I'm going to begin by asking counsel to introduce yourselves for the record, and then we can discuss logistics, and then get going. For the plaintiff?

MS. MUELLER: Good afternoon, Your Honor. Claire Mueller for the plaintiff. With me here at counsel table is Emily Wasserman; Brooke Rogers; Tess Hand-Bender; Stephen Snow; our client, Aaron Thompson, general counsel of DPS; and two additional attorneys, Nicholas Moskevich and Hannah McCrory.

THE COURT: Thank you. Welcome. For the defendants?

MR. TRASKOS: Your Honor, Kevin Traskos for the defendants. With me is Thomas Isler, Nicholas Deuschle, and Katherine Ross.

THE COURT: Thank you all for being here. So, first of all, I will just let you know my plan for today as we indicated in the order setting this hearing is to give each side 30 minutes for essentially oral argument. I have reviewed all of the briefing and all of the declarations that have been filed by both -- well, actually, the declarations only on behalf of the plaintiffs. So, you don't need to go back over all of that, obviously. Just highlight those things.

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1 The reason I decided, after initially thinking I
2 wouldn't, that we should have a hearing is because I do have a
3 few questions for each side that I hope to get some
4 clarification on today. So, this process will be sort of you to
5 get up, I will try to give you a chance to say what you want to
6 say, highlight the things you want to say, but also I will be
7 interrupting you and asking questions.

8 The plaintiffs can reserve some amount of their time
9 for rebuttal. I will ask Ms. Guerra to give you a five-minute
10 warning, but if you want to reserve time, that's kind of up to
11 you to keep track of it. The other thing, I do think I will try
12 to rule from the bench today. So, that was another reason to
13 have the hearing. I will probably take a short recess after the
14 hour of discussion, go back, make sure I feel comfortable with
15 the ruling, and then come back and do that from the bench.

16 So, that's my plan for today. With that, for the
17 plaintiff?

18 MS. MUELLER: Good afternoon, Your Honor. And thank
19 you for hearing us today. May it please the Court, for more
20 than 30 years, schools have been classified as protected areas
21 when it comes to immigration enforcement activities. A
22 classification that's based on a recognition that as a society,
23 we value schools, education, and protecting our children. As
24 crystalized in the 2021 iteration of that policy, to the fullest
25 extent possible, defendants should not take an enforcement

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1 action in or near a location that would restrain people's access
2 to essential services because of the resultant negative impacts.

3 This is a, quote, fundamental principle that under the
4 2021 policy was safeguarded by DHS's allowance of enforcement
5 actions at schools only in limited circumstances. For decades,
6 school districts such as DPS and their communities of students
7 and families have relied on those protections.

8 In January of this year, defendants rescinded the
9 thoroughly reasoned 2021 policy and replaced it with the 2025
10 policy. That policy is arbitrary and capricious, something
11 defendants do not dispute. It does away with 30 years of
12 protections without any reasoning, relevant data, acknowledgment
13 of past reliance, and without consideration of whether its goals
14 could have been accomplished within the then existing policy.

15 The 2025 policy is guided by nothing more than
16 directions for defendants and their component agencies to use,
17 quote, common sense. The uncertainty of that guidance has
18 caused actual demonstratable harms to DPS. As such, DPS has
19 brought an APA challenge to the 2025 policy. In the meantime,
20 DPS seeks a preliminary injunction requiring defendants to
21 return to the status quo under the 2021 policy until the merits
22 of defendant's arbitrary and capricious actions can be ruled
23 upon by this Court. Because DPS has standing under Article III
24 and has established its right to judicial review under the APA,
25 DPS asks that you enter the requested injunction.

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1 Unless Your Honor would like to begin somewhere else, I
2 plan to begin with the threshold issue of standing, which --

3 THE COURT: Yeah. Let me just get a couple of bits of
4 clarification out of the way first before we dive into some of
5 the deep legal questions. Number one, this is just a challenge
6 under the APA; right? There's no challenge of allegation of a
7 violation of the immigration statutes or any other statute. No
8 constitutional claims here; right?

9 MS. MUELLER: No constitutional claims, and just an
10 APA.

11 THE COURT: And for purposes of today, at least, of
12 the injunction, you no longer are pressing your FOIA claim; is
13 that right?

14 MS. MUELLER: That's correct, Your Honor.

15 THE COURT: All right. And then so somewhat more
16 difficult question, but really a key question for me is what do
17 you view as the actual legal difference between the 21 -- 2021
18 policy and the current 2025 policy? Because I understand there
19 is a lot of confusion and uncertainty, but I am concerned with
20 the actual legal differences. So, if you could highlight for me
21 what you think is actually legally different between life under
22 the 2021 memo and today, I think that's where I'd like to start.

23 MS. MUELLER: Of course, Your Honor. So, the 2021
24 memo policy allowed, we admit, obviously, enforcement actions at
25 schools or near schools in certain circumstances, but those

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1 circumstances were enumerated and quite limited. Exigent
2 circumstances were one, of course. But other actions required
3 prior approval from ICE or agency headquarters before
4 implementing those actions, and those sorts of guardrails were
5 what gave DPS the ability to assure its students that at least
6 to an -- to a certain extent enforcement actions would not be
7 happening in schools.

8 And by that I mean routine immigration sweeps, for
9 example, would not be occurring at school under -- on a off or
10 regular basis. And it is the removal of those guidelines, ones
11 that DPS has relied on for years, that is causing the harm.
12 Now, under the 2025 policy, all that's required is that agents,
13 maybe lieutenant level -- there might be some approval maybe
14 required at a lieutenant level, but it's --

15 THE COURT: I mean, to me, the approval is actually
16 clearer -- who has to make the approval is actually clearer in
17 the current Vitello memo than under the 2021, which just said,
18 if you want to do something else, you have to get prior approval
19 from agency headquarters or as you otherwise delegate, and the
20 current policy has actual -- says who should make these
21 decisions. Why is that a big, significant --

22 MS. MUELLER: Maybe the rank of who is giving the
23 approval is not the cause of the harm, but I think what is more
24 of the issue is that under the 2021 policy, when considering
25 whether or not to give that approval, the 2021 policy was very

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1 clear about what to consider, including those -- that
2 fundamental principle that we don't want to interrupt essential
3 services, we don't want to interfere with people's rights to
4 access those essential services or to participate in essential
5 activities. And it was an enumerated list of these are the
6 circumstances when immigration priorities might outweigh --
7 outweigh those more societal interests.

8 But here, there's no information, no guidance, no
9 understanding, and no clarity about what these supervisors would
10 be considering when they make these decisions. So, the
11 consideration -- the approval was enumerated and clear under the
12 2021 policy, and now we are left to the whim of a lieutenant who
13 decides that under his common sense approach to immigration
14 action, a raid of the school makes sense.

15 THE COURT: But the prior policy, the '21 policy
16 actually says both as to what constitutes a protected area,
17 which I think under the current memo is very similar, at least,
18 but that list is not complete, and you have to use judgment.
19 When it describes these factors that you should consider or
20 reasons when a immigration action in one of those areas might be
21 appropriate, the 2021 memo says this list is not complete. It
22 includes only examples. Here again, the exercise of judgment is
23 required. So, it's not really as definitive as you're making it
24 out to be by its terms. Perhaps it was implemented in a way
25 that was more definitive. Is that the argument?

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1 MS. MUELLER: That is a part of the argument, for
2 sure, because, you know, under the 2021 policy, DPS was able to
3 rely on these guardrails and was able to provide some amount of
4 assurance to its families that only under those circumstances
5 should they be concerned; right? Here, DPS is not able to do
6 that. And more so, as demonstrated in the declarations that we
7 have submitted, people recognize a difference. Students are
8 afraid to come to school. Parents are afraid to send their kids
9 to school. There are multiple false reports of ICE actions at
10 schools, something that never happened under the 2021 policy.

11 THE COURT: Let me -- I do want to get into that, but
12 I just -- I want to get us back to the actual legal differences,
13 because as you acknowledge, those are false rumors or false --
14 false statements that there are going to be raids. And there
15 haven't been any actual raids, at least your client's -- or
16 actions, I should say, on any of your client's schools or in
17 anything that would be covered by near a school as far as you
18 have provided me; is that right?

19 MS. MUELLER: The nearness, I would maybe dispute.
20 The February 5th raid that occurred at the Cedar Run apartments
21 was within one to two miles of, I believe four to five different
22 schools. A DPS bus stop was blocked by prison buses.

23 THE COURT: So, let me -- all right. We are getting
24 off track from where either one of us wanted to go, which is
25 fine. Which is fine. But let me ask you about that. So, is

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1 your position that if I had issued this injunction earlier, that
2 that would have been prohibited, that raid at Cedar Run would
3 have violated an injunction if I had imposed it before then?

4 MS. MUELLER: Not necessarily. I think it would
5 depend on the circumstances. As you -- as you point out, there
6 was -- there was some level of discretion, obviously, under even
7 the 2021 policy. But what I think is the issue, you know, DPS
8 is not saying this immigration action is okay, and this one
9 isn't. We're not asking for the Government to change its
10 immigration enforcement priorities. We're not saying arrest
11 fewer people or arrest more people. All the harm that DPS has
12 incurred has become specifically from the lack of reasoning and
13 the uncertainty that has resolved -- has resulted from the
14 enactment of the 2025 policy without any insight into what the
15 agency was thinking or, you know, any accounting for the fact
16 that for 30 years or more, schools like DPS have relied on the
17 fact that they are a protected space.

18 And I understand the 2025 memo has a footnote that
19 mentions schools are still protected, but under the memo, that
20 feels like a very empty designation. It doesn't occur -- it's
21 not clear that there's any real protection in the sort of
22 guided, principled, reasoned way that the 2021 policy provided.

23 THE COURT: Well, I understand that. And I do want to
24 let you talk about standing, and this will maybe give you an
25 opening to do that, but isn't your sort of inability to tell me

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1 clearly, yes, that raid at an apartment complex violates an
2 injunction that you enforce, doesn't that kind of highlight that
3 we don't really know what a lot of this confusion and harm is
4 coming from? There are a lot of changes going on, obviously, in
5 regards to immigration enforcement. There are people rightfully
6 afraid and nervous about how this might affect them, but very
7 little of that is actually based on the change between the
8 '21 -- 2021 memo and the 2025 memo.

9 How do I distinguish between just generalized fear that
10 a lot more enforcement is going to go on, or enforcement at say
11 an apartment complex that gets in the way or that scares people,
12 that wouldn't be prohibited, perhaps, versus what would be
13 prohibited? And so just the fact that people are nervous about
14 increased enforcement doesn't answer the question I have to
15 answer, which is how much of that harm that you allege has been
16 caused to your client is actually caused by the differences
17 between these two memos versus all the other things that are
18 going on?

19 MS. MUELLER: Yeah. I would respond in two ways.
20 First, I would point this Court to the district of Maryland's
21 recent ruling in the *Yearly Meeting* case, which obviously
22 interpreted this same policy or, you know, granted an injunction
23 in that case for specific religious groups. And there, the
24 Court said, yes, there -- you know, there is an argument that
25 some people are generally concerned about enforcement actions,

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1 but the evidence in that case, as is in this case, demonstrates
2 that it is traceable. There are people who are specifically
3 saying, things have changed. I used to feel comfortable sending
4 my kids to school. I do not anymore, and the only thing that's
5 changed is the difference in the policy.

6 And when we're talking about traceabilities and
7 causation in this context, when it depends in a way on
8 third-party decision-making, all the Supreme Court requires is
9 that the actions of those third parties be predictable -- a
10 predictable reaction to government action; right? And in that
11 sense, I would point the Court to the -- excuse me -- the
12 *Department of Commerce* case, where in that case the secretary
13 wanted to add a question to the census about citizenship. There
14 it was future harm that was alleged. It was states and
15 districts alleging that people would be afraid to answer that
16 question. Therefore they would have undercounted populations,
17 and therefore they wouldn't get as much federal funding; right?
18 All future harm.

19 But even there, the Court said that's sufficient,
20 because it's a predictable result of this citizenship question
21 that people who are concerned about their legal status won't
22 answer that question. That's predictable. And here is the same
23 and more, because we have actual evidence that it has already
24 happened. People are already having those predictable
25 reactions.

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1 And secondly, I think it's hard to -- I would encourage
2 this Court to view the evidence not in a vacuum, but in the
3 context of the defendant's own statements. The policy -- the
4 first indication that they had rescinded the 2021 policy was a
5 press statement from the Department of Homeland Security which
6 said essentially, no longer will criminals, including murderers
7 and rapists, be allowed to hide in schools; right? We have
8 multimillion ad campaigns being pushed out by defendants saying,
9 if you don't leave, we will find you, and we will deport you.

10 THE COURT: Right. But nothing I do will change any
11 of that; right? They can still do all that.

12 MS. MUELLER: Of course.

13 THE COURT: And even if I agree with you completely,
14 they can still do all that. They can just have -- whoever they
15 delegate the decision-making to under the 2021 memo can say,
16 yup, go ahead and do everything, I agree completely; right? I
17 mean, under the 2021 memo, the decision maker could do all those
18 things and approve everything you're afraid of; right?

19 MS. MUELLER: I suppose in principle, but in practice,
20 it didn't happen, and I think that's the difference.

21 THE COURT: Well, it didn't happen, but the decision
22 makers are different now; right? And I mean, in some ways, the
23 decision maker under the new policy is more likely to be a
24 career agent, and less likely to be a political appointee, would
25 seem potentially, at least, to be neutral or favorable, I guess.

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1 MS. MUELLER: I think when we talk about who is making
2 the -- again, maybe I shouldn't have relied on who is making the
3 decision. I think what's missing in the 2025 policy that
4 existed in the 2021 policy is this, quote, fundamental principle
5 that to the fullest extent possible, immigration action --
6 enforcement actions must -- should be avoided; right? And that
7 sort of -- I don't want to use guarantee, but that provision,
8 that policy, that principle was at the core of the 2021 policy,
9 and the decades of its iterations in the past.

10 And here, that has been completely removed. There is
11 no -- there is no similar recognition of the desire to avoid
12 actions at schools. And now, it's been blown open, the
13 possibilities. And that is -- I mean, again, DPS is not
14 saying -- it's not asking for a ruling on the merits of that
15 policy decision. It is just saying the uncertainty that has
16 been created is what is now causing harm to DPS, because it's
17 interfering with our abilities to educate children. It's
18 forcing us to react to missing children.

19 Are they here because -- are they gone because they're
20 sick? Are they gone because they've been deported? DPS has an
21 obligation to follow up on those things, and not just
22 new-to-country students are impacted by this. When DPS is
23 sending community resources officers to, you know, check out the
24 raid that's happening down the streets, students with normal
25 preexisting hurdles are not being serviced. And so it's that

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1 sort of interference with the core function of education, which
2 was able to exist without these distractions under the 2021
3 policy.

4 THE COURT: Look, I get it. My mom was a public
5 schoolteacher, taught English as a second language to a lot of
6 immigrant families. It is a hard thing to do to run a school
7 district, to run a school. But again, and I want to go back and
8 try to get you to tell me whether you really think I would be
9 effectively enjoining the action at a place like the Cedar Run
10 apartments, I think it is, that -- because that to me is -- as
11 you just pointed out, there's a lot going on. People's families
12 are being -- their apartment complexes are being surrounded, as
13 you've alleged, by immigration enforcement officers. But if
14 that's not prohibited by this injunction, then I'm not doing
15 anything to redress that harm.

16 And so again, I'm trying to go back to not just -- I
17 think you've -- there's plenty of evidence here that DPS is
18 having to incur all of those expenses in terms of time and
19 effort and potentially money that you've addressed. What I'm
20 having trouble is tracing that to the precise issue we're
21 addressing here, rather than more aggressive enforcement in
22 general, because that's going to still exist. You're going
23 to -- your client is going to have to do all of those things
24 anyway; right? Unless -- I mean, I guess, as the defense points
25 out, taken literally, basically the whole city is a protected

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1 area, because everything is near a school, if a mile is close
2 enough or within -- is near a bus stop for sure, because there's
3 hundreds of those.

4 So, if -- I mean, I guess if that's the case, then
5 maybe we would be doing something. But I guess I'm having
6 trouble seeing if all these other things are going to be going
7 on, how saying, yeah, you gotta go back to this particular
8 bureaucratic process is going to solve any of those problems for
9 you.

10 MS. MUELLER: I just think it would, because it did in
11 the past. I mean, when -- when -- under the -- let me be clear,
12 DPS obviously is not asking for this Court to enjoin a
13 particular, you know, enforcement actions, necessarily. We're
14 asking just for a return to the status quo until we can figure
15 out what the reasoning was behind this 2025 policy.

16 THE COURT: While you bring up the status quo, do you
17 dispute that this is a disfavored injunction? I mean, the
18 status quo today is that the 2025 memo is in place; right?

19 MS. MUELLER: I believe as the Tenth Circuit has
20 defined it, the status quo is the last uncontested time. So,
21 yes. And I would -- we do dispute that this would be a
22 disfavored under the status quo element, as well as I think
23 defendants argue that we would be asking for all relief we could
24 eventually get at trial, which we dispute as well. We are
25 asking here for a temporary injunction to return to the status

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1 quo while we determine the merits. At the end of the case, you
2 know, we would be seeking an order to set aside the policy as
3 arbitrary and capricious.

4 But this is a temporary sort of pause. I would also
5 note that under section 705, I believe of the APA, the Court is
6 entitled to delay the effective date of a new policy. So, we
7 would be welcome to a remedy under that section as well that
8 would postpone the effective date of the 2025 policy pending
9 judicial review.

10 So, now I forgot what your question was.

11 THE COURT: I think you actually did a pretty good job
12 of answering it nonetheless, but let me give you two other
13 things to consider responding to. Number one is the 2021 memo,
14 all these memos explicitly tell everyone at the end that this
15 guidance is not intended to, does not, and may not be relied
16 upon to create any right or benefit, substantive or procedural,
17 enforceable at law by any party in any administrative civil or
18 criminal matter.

19 Why is that -- why does that not apply?

20 MS. MUELLER: I think, for that point, I would turn
21 the Court to the *Department of Homeland Security* -- sorry. The
22 *Regents of the University* -- the *DACA* case; right? They are on
23 pages 30 to 31. The Court discusses these disclaimers and says
24 that they are pertinent in considering the strength of reliance
25 interests, but not as a sort of bar to review in the first

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1 instance. In fact, they say that the strength or not of those
2 reliance interests is something the agency itself needs to
3 consider when it promulgates new --

4 THE COURT: Then why don't you explain why you think
5 this is a final action, because it doesn't seem at all like the
6 DACA action. It doesn't seem at all like the *Waters of the*
7 *United States* jurisdictional determination which creates a
8 binding -- at least temporarily binding decision. It really --
9 the safe harbor cases that you cited, this doesn't seem to
10 create any safe harbor for anyone. It just creates kind of an
11 explanation of how, as you said, decision makers should factor
12 various things into their decision, which is not in my view
13 typically viewed as a final agency action.

14 MS. MUELLER: No. So, final agency action is -- you
15 know, I think we should remind the Court that it's a pragmatic
16 and flexible standard, and it's one that can encompass into
17 non-legislative rules like the one we have here. The standards
18 there are a consummation of decision-making process and, you
19 know, legal consequences flowing therefrom.

20 Defendants don't dispute that this was a consummation
21 of a decision-making process. They only say that there are no
22 legal consequences. But in that regard, DPS would argue that
23 legal consequences can bind both the agency and others; right?

24 And here, I would point to the *Bennett* case, which sets
25 up that standard. There, the Court notes that when an action

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1 changes the legal regime under which an agency acts, that can
2 create legal consequences. Here, we have a change to the legal
3 regime of how agencies decide to or not enforce immigration
4 actions. They once were bound by clear guardrails and clear
5 considerations and a clear statement of avoiding these things at
6 all costs, whereas now it's unbridled and unclear and unguided.

7 And just because it's unguided doesn't mean it's
8 binding. It's just as binding as the 2021 policy. So, we would
9 say that legal consequences flow because the agency itself is
10 bound by this action.

11 And I agree that the safe harbor cases were distinctive
12 in a way, but in practicality, the 2021 policy and the decades
13 of the protected area policy did create a safe harbor of sorts.
14 Not statutorily, I suppose, but in practice, and one that DPS
15 has relied on for decades.

16 Because by, you know, private -- by providing these
17 like sort of predictable guidelines that governed enforcement
18 actions, parties like DPS were able to rely on it as a norm or a
19 safe harbor by which to shape their actions. And, you know, a
20 defendant -- there are Courts who recognize the practical
21 consequences. Not necessarily just legal -- you know, legal
22 consequences under statute necessarily, but the practical
23 effects. The practical effects under this pragmatic approach
24 can be considered, and we would urge the Court to consider them
25 here, because it -- it has had, as you note, Your Honor, serious

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1 and demonstratable practical effects on DPS and its mission.

2 So, I guess that is -- that is why I would say it's a
3 final agency action. To say that, you know, a policy that's
4 been in place for 30 years is not fight -- the rescindment of
5 that longstanding policy is not final, I don't know. Just urges
6 some sort of form over substance, I suppose. And I am close to
7 wanting to reserve my time for rebuttal.

8 THE COURT: Let me just give you -- if you want to
9 take a minute of it to overcome my extreme reluctance to
10 consider a nationwide injunction. I have been -- tried in my
11 time on the bench to be as careful as possible about only
12 issuing injunctions that serve the actual purpose of a
13 preliminary injunction in particular as meant to preserve the
14 status quo between the parties until we can resolve an issue on
15 the merits. A nationwide injunction seems to go well beyond
16 that.

17 I do want to just give you a moment, if you want, to
18 try to convince me. I mean, I know everybody has kind of
19 switched sides on nationwide injunctions and their propriety in
20 the last few weeks, but I'm trying to be consistent.

21 MS. MUELLER: Yeah. I think we would state that it's
22 actually hard to imagine that schools across the country aren't
23 in the same position. You know, they -- you have the broad
24 discretion to craft those remedies, and it's appropriate here
25 when it would sort of create inequitable treatment as to other

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1 districts if Denver is protected, but for example Aurora, who is
2 sometimes literally across the street, does not have the same
3 protection, then that sort of inequitable result is what urges a
4 nationwide injunction, because the harms are similar across the
5 board.

6 THE COURT: All right. Thank you. I will let you
7 reserve the rest of your time.

8 MS. MUELLER: Thank you, Your Honor.

9 THE COURT: Mr. Traskos?

10 MR. TRASKOS: Your Honor, I have a preliminary
11 question. We had hoped to, to the extent possible, divide
12 arguments on standing and the APA between myself and Mr. Isler.
13 Would the Court have any objection to doing that?

14 THE COURT: No. We can try that. Go ahead.

15 MR. TRASKOS: Okay. Thank you, Your Honor. Counsel.
16 The change in guidance at issue in this case implicates three
17 different areas where Courts have recognized that judicial
18 review is restricted. It involves internal guidance directed to
19 executive branch employees, not external rules imposing duties
20 on the public. It involves law enforcement discretion about how
21 to enforce federal law. It involves immigration enforcement,
22 which implicates not only law enforcement, but foreign policy
23 objectives. And in this context, we don't think that DPS has
24 met its heavy burden for an injunction.

25 THE COURT: So, all of those things I agree with you

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1 are areas where Courts have been particularly reluctant, but I
2 think you would agree none of those are bright lines that would
3 say you can't issue an injunction ever if it touches on one or
4 more of those areas.

5 MR. TRASKOS: I agree that not touching on those
6 issues is not enough, but I do think that the principles that
7 apply in some specific contexts do restrict judicial review
8 here. And I will start with the first prong, cognizable injury,
9 and the Supreme Court's decision in *U.S. versus Texas*, because I
10 think that it shows that DPS does not have any legally
11 cognizable injury. And that case, like this one, involved 2021
12 guidelines by DHS. The states argued that those guidelines had
13 adverse effects on them, and the Court didn't really dispute the
14 adverse effects, but what it said is that those states lacked a
15 legally cognizable injury.

16 And it acknowledged in footnote two that the target of
17 enforcement may have a cognizable injury and enforcement, but it
18 held that other parties can't claim cognizable injury. And it
19 relied on its decision in *Linda RS* that a private citizen lacks
20 a judicially cognizable interest in the prosecution or
21 non-prosecution of another. And the Court relied on several --
22 explained it had several good reasons for reaching this
23 conclusion, not just one. It noted the Article Two problems
24 raised by judicial review of the guidelines. It noted the
25 longstanding principle of enforcement discretion. It explained

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1 that this principle extends to the immigration context, which
2 implicates not just law enforcement, but foreign policy
3 objectives. It observed the executive branch in devising
4 immigration enforcement has to take into account public safety
5 and public welfare needs.

6 THE COURT: Sorry to interrupt you. Isn't plaintiff
7 right that that decision is really focused on an effort to
8 demand additional enforcement, and the Court was pretty focused
9 on how that sort of a request to get the Government to do more
10 to prosecute someone else is basically unprecedented? Isn't
11 that what the Court said in that case?

12 MR. TRASKOS: I think that's the Court's holding. I
13 don't think that's a fair characterization of the Court's logic.
14 And it indicated in several different ways that its logic was
15 not just about that particular claim. It said that it wasn't
16 really about this nonenforcement decisions when it relied on
17 *Linda RS*, which is about the prosecution or non-prosecution of
18 another. It explained that that holding applies to the
19 executive branch's exercise of enforcement discretion over
20 whether to arrest or prosecute, not just one -- it's not the
21 outcome. It's the nature of the decision.

22 And to point out that the plaintiffs have a heavy
23 burden to show injury when it results from the regulation or
24 lack of regulation of someone else. So, I don't think it's
25 simply focused on the nonenforcement decision. And I think that

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1 the Court in *Philadelphia Yearly* read that case too narrowly.
2 It said that -- in *Philadelphia Yearly*, the Court there pointed
3 out that someone -- when there's an arrest, there actually may
4 be enforcement that's subject to challenge. And it relied on
5 footnote two of the *Texas* case, but that footnote, as I
6 mentioned, really points out that the object of the
7 enforcement -- the person facing arrest may have a cognizable
8 injury.

9 The rest of the decision relies on broader principles
10 saying that others can't decide to challenge that enforcement
11 discretion, and it's -- general discussion of immigration
12 enforcement discretion is not really limited to principles that
13 are specific to arrest. It covers essentially the broader
14 Article Two powers of the Government in making enforcement --
15 what it described as enforcement choices in this area.

16 And I think that that logic extends more broadly than
17 just to the particular claim that was asserted in that case. I
18 think if it had been the opposite claim, the Court would have
19 found -- and the Court lists a bunch of exceptions to the rule
20 in the *Texas* case, but none of them suggest that this particular
21 decision here, the guidance would have been covered.

22 We would say even aside from the *Texas* decision, DPS
23 can't show injury to itself as an organization based on reduced
24 attendance, for a few reasons. One defect with this attendance
25 theory is that the harm that it claims is not direct. In

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1 *Hippocratic Medicine*, the Supreme Court approved standing under
2 the *Havens Realty* test, where it's a defendant's conduct
3 directly affected and interfered with the plaintiff's core
4 business activities. In that case, the defendant directly lied
5 to the plaintiff's employees.

6 And here I think it's clear that the theory is
7 indirect. It's that the threat of enforcement raises concerns
8 in third parties, which then harms DPS's function of teaching
9 them. And I think that's an indirect theory rather than the
10 direct theory in *Havens Realty*.

11 And I think there's also a separate issue, which is
12 that there are lots of special standing rules that govern
13 parties that seek to challenge a threat of future enforcement.
14 Plaintiff has to show that the injury is imminent, certainly
15 pending, concrete. And the Supreme Court in *Clapper* rejected an
16 argument that the party challenging potential enforcement can
17 rely on an injury that's the product --

18 THE COURT REPORTER: Counsel, you're losing me.

19 MR. TRASKOS: The Supreme Court in *Clapper* rejected an
20 argument that the party challenging potential enforcement could
21 rely on a product of the fears of that enforcement. And here I
22 think the injury again relies on a product of the fears. DPS is
23 taking a noncognizable injury, which is the fears of enforcement
24 of third parties, and then saying that as an organization,
25 because it's -- has downstream effects from those fears, it is

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1 then again a cognizable injury. And I think that logic sort of
2 disregards *Clapper*.

3 THE COURT: Why isn't the census case a good analogy?

4 MR. TRASKOS: So, I think there are two reasons. One
5 is I think the census case is a little different, because that
6 is not a claim challenging the threat of potential enforcement.
7 It's a claim that -- the actual substantive claim in that case
8 is challenging the citizenship question which was going to be
9 sent to people. So, I think that that sort of claim is
10 different, and I think it's also important to look at the more
11 recent description of that case from the *Murthy versus Missouri*
12 case, in footnote I think seven or eight of that case.

13 The *Murthy* case talks about that analysis in explaining
14 why that same analysis doesn't apply. What it points out is
15 that -- really it's talking about it on the causation prong, but
16 it says that in *Department of Commerce* there was a trial that
17 pinpointed that that specific question being issued would
18 actually cause the harm. And that's different from in the
19 *Murthy* case, they said if you have more murky evidence -- and
20 "murky" was the sort of phrase that *Murthy* used -- that you may
21 not reach the same results. So, it suggested that the
22 Department of Commerce -- I mean, you still can consider it, but
23 I think it has to be particularly strong evidence to get past
24 the *Murthy* standard.

25 It dealt with that I think in particular in dealing

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1 with traceability, but I guess I just want to make sort of one
2 more point on the injury point, which is that I think that the
3 Court in *Hippocratic Medicine* pretty flatly stated that it was
4 incorrect that an organization can show an injury to itself
5 based on the decision to divert resources. And the division
6 here is DPS's decision. It's -- the 2025 guidance is internal,
7 and it doesn't direct schools to conform their conduct in any
8 way.

9 I'm going to turn to causation and traceability. And
10 one point on causation and traceability is that under
11 *Hippocratic Medicine*, some theories of traceability and
12 causation, even if the causal chain could be established, are
13 simply too sweeping. What the Court pointed out there is that
14 if the FDA approves a drug, that might in fact affect doctors
15 downstream, but the Court said that that causal chain is just
16 too sweeping for it to accept. And it indicated that many
17 professions are affected by government decisions, and as a
18 specific example it highlighted that teachers might try to sue
19 to challenge lax immigration policies that they claimed led to
20 overcrowded classrooms.

21 And the Court made clear that that kind of theory would
22 have been too sweeping, even if there was an actual causal
23 chain. And so that example highlights that -- I mean, a few
24 years ago, if a school district had challenged the 2021 guidance
25 saying that it was affecting their classrooms, the Court would

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1 have rejected that causal chain, and the same logic and result
2 here should apply to DPS's theory. So, even if there is a
3 causal chain, it's too sweeping and limitless under *Hippocratic*
4 *Medicine*.

5 But I think even if the Court focuses just on whether
6 the causal chain works, I think that the Supreme Court clarified
7 in *Haaland versus Brackeen* that the injury has to be traceable
8 to the defendant's unlawful conduct. And the Court explained in
9 *Murthy* in footnote eight that it's not enough if it's murky.

10 And here -- and I guess one other point is that in *Clapper*, it
11 made clear that the third party's fear of enforcement can
12 disrupt the causal chain.

13 So, in *Clapper*, in footnote seven, the plaintiffs
14 argued that a cause of their injury was that the Government
15 surveillance was causing third parties not to speak with them,
16 and the Court in footnote seven rejected that, saying even if
17 that wasn't conjecture, essentially even if the causal chain
18 worked, the injury was still not traceable to the surveillance,
19 because it was based on third-party subjective fear of
20 surveillance. And so again, here, the causal chain goes through
21 the subjective concerns of third parties.

22 And I think as the Court alluded to, there's a lot of
23 factors here. There's a national increase in immigration
24 enforcement. There are government statements that are separate
25 from the guidance itself. There's recent immigration

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1 enforcement that did not actually occur in a school. There's
2 false reports of immigration enforcement at schools. And I
3 think that that type of the -- many different factors separate
4 this case from the situation in the *Department of Commerce*.

5 THE COURT: Let me just get you to respond to the sort
6 of argument that was highlighted today about that the actual
7 harm that DPS is complaining of comes less from sort of the
8 specific process and more from the removal of kind of clear
9 guidelines from the 2021 memo about when enforcement might
10 occur. Why is that not sufficient?

11 MR. TRASKOS: I think that given the number of other
12 factors here, and given that as the Court noted, that it's not
13 even clear that the particular enforcement action that happened,
14 that the apartment complex couldn't have happened otherwise
15 under the 2021 guidance, it's hard to trace that and pinpoint it
16 as coming from the changing guidance as opposed to all the other
17 factors.

18 THE COURT: Okay.

19 MR. TRASKOS: On the last point on redressability on
20 standing, one of the things that the Court highlighted in
21 *Brackeen* is that the Court has to examine whether it can give
22 the plaintiff a legally enforceable protection from the harm.
23 And the harm -- any order the Court issued here would be limited
24 in several ways in terms of what it could do for DPS. Because
25 of 1252(f)(1), it couldn't, I think, bar arrests at schools

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1 under 1226 or 1231. Reinstating the 2021 guidance wouldn't stop
2 ICE enforcement out in the community. It would not prevent
3 false reports. It would not provide any absolute guarantee
4 against immigration enforcement at schools, which was never
5 prohibited under the 2021 guidance.

6 And even if the Court ordered DHS not to rely on the
7 2025 guidance, that doesn't mean that it would be ordering it to
8 follow the 2021 guidance. An order that directed it to follow
9 the 2021 guidance would essentially be taking internal guidance
10 and elevating it to a court order.

11 Restoring the guidance essentially wouldn't give DPS
12 any enforceable rights, since it never actually originally had
13 the right to require DHS to adhere to that guidance. So, with
14 all of these limits, any order wouldn't clearly give DPS some
15 legally enforceable protection from the harms that it claims.

16 It might have public impact, but the Court in *Brackeen*
17 made clear that just sort of the impact of the Court's decision
18 is not enough. It has to be that the Court's order itself is
19 going to provide the legally enforceable protection from the
20 harm. And I think the Court in *Philadelphia Yearly* didn't look
21 at that requirement at all in reaching the conclusion. So, here
22 the Court would need to consider those limitations in deciding
23 whether it was actually really giving DPS a legally enforceable
24 right.

25 THE COURT: Do we know of any instances where

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1 someone -- a school or anyone else under the prior policy was
2 able to use that -- the 2021 memo or policy, whatever we want to
3 call it, in court as a legally enforceable right?

4 MR. TRASKOS: I'm not aware of any.

5 THE COURT: Okay. Thank you.

6 MR. TRASKOS: I will leave my time to Mr. Isler.
7 Thank you. I apologize.

8 THE COURT: Mr. Isler?

9 MR. ISLER: Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 MR. ISLER: I'd like to make just a few points with
12 the APA. And it may make sense to start at final agency action
13 because of the discussion that you had with counsel earlier.
14 One point I would like to make on that is DPS has made the
15 argument that practical effects can lead to finality, but that
16 is not the test that the Supreme Court repeatedly has gone back
17 to.

18 And in fact, the case that DPS relies on, that *CSI*
19 *Aviation Services* case from the DC Circuit actually had pretty
20 clear legal consequences. What happened in that case was the
21 Department of Transportation told *CSI Aviation* that they were in
22 violation of a statute, but if they ceased and desisted from
23 that conduct, that the DOT would refrain from taking an
24 enforcement action.

25 So, that's a pretty clear example of legal consequences

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1 flowing from agency action. It doesn't stand for the
2 preposition that just practical effects are enough to satisfy
3 the final agency action test under the Supreme Court cases.

4 The other cases that DPS rely on also have those
5 outward-facing legal consequences. So, for instance, in the
6 *Texas versus EEOC* case from the Fifth Circuit, that guidance was
7 not just an internal guidance to its own -- to the agency's own
8 employees, but it was explicitly designed for employers to rely
9 on it and individuals who were potentially subject to illegal
10 hiring or promotion practices to rely on that guidance.

11 And that manual -- also, the Supreme Court -- the Fifth
12 Circuit pointed out that it left no room for the agency
13 employees to avoid certain decisions, and -- with respect to
14 certain types of employment problems. It committed the agency,
15 in other words, to a specific approach, and that is what's
16 missing in this case.

17 THE COURT: How so? I mean, I think their argument is
18 that that's exactly what this does -- the 2021 did. The 2025,
19 maybe their argument is, doesn't do that.

20 MR. ISLER: The 2021 memo was not categorical, as you
21 pointed out. I mean, it did have language suggesting that there
22 was a reluctance to do these enforcement actions, but it always
23 left open the possibility that there was room for the exercise
24 of discretion. And it did include a list of some limited
25 circumstances, but that list was not exclusive. And it again

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1 gave advice to the law enforcement officers that they needed to
2 exercise their discretion.

3 So, absent exigent circumstances, those employees could
4 under the fact -- specific facts of an individual case, could
5 get approval from either headquarters or whoever else was
6 designated to give that supervisory approval, to go ahead and
7 make -- get those approvals for an individual enforcement
8 action.

9 One of the other cases that DPS relies on is the *Cohen*
10 case out of the DC Circuit. A panel opinion, that panel opinion
11 was vacated to the extent that it was -- to the extent it
12 reversed or remanded the appellant's APA claim. But even if
13 *Cohen* was still good law, it's distinguishable in the same way
14 as the *Texas versus EEOC* case, because the IRS declared that it
15 was going to follow the holdings of five circuit courts that
16 concluded how taxes should be collected with respect to certain
17 long distance telephone calls. And the -- that had legal
18 consequences for both the people who collected the taxes and the
19 people who owed those taxes.

20 So, it was -- what we have in this case is you have an
21 internal memo that is not designed to go to outside parties. It
22 is not directing outside parties' behavior. It is not telling
23 them that if they meet certain criteria, they will then be
24 protected like you would in a safe harbor from certain
25 enforcement actions.

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1 You don't have the -- in the memo, it is not limiting
2 the statutory right. It's not interpreting the extent of the
3 statutory authority for the agencies. It is -- it is really
4 just giving the guidance to its own individual employees. And
5 so that is -- makes it a different kind of -- different kind of
6 advice when an agency is just giving its approach -- its
7 preferred approach to its law enforcement agents. That is what
8 would not constitute the final agency action, because you don't
9 have legal consequences flowing from that -- from that approach.

10 THE COURT: Well, what if -- I mean, legal
11 consequences in some sense is kind of circular. If I say it's
12 enforceable, then it has a legal consequence; right? But if --
13 so, I guess my question is if -- what if the 2021 memo just said
14 we're never going to have immigration enforcement officers on
15 school grounds? So, it's just nice and clear, then DPS could
16 have no question. They're never going to have to worry about
17 ICE officers coming onto their grounds. Would that still --
18 would your analysis still apply to that because it's just
19 internal? You know, it's not directed at them. It's directed
20 at ICE officers, but would that still not have legal
21 consequences?

22 MR. ISLER: I don't think that it necessarily would
23 have legal consequences if it is just a memo coming down to law
24 enforcement officers. If, say, that was elevated to the status
25 of a regulation that really had the force of law, then I think

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1 that might be a different situation. But I think, again, if
2 what the Courts do in these situations is they look at the
3 language of the guidance or the manuals or the notices, and
4 they -- they conduct an analysis of what would -- you know, is
5 the agency intending to have third parties rely on this
6 conduct -- rely on this advice?

7 And so I think that an internal memo that just said our
8 approach is going to be not to go into schools, I don't think
9 that that would still -- that would have the force and effect of
10 law. And so I don't think that would necessarily on its own
11 just be a final agency action.

12 THE COURT: Okay.

13 MR. ISLER: One other point I'd like to address is
14 just on the -- one other issue related to the APA of committed
15 to agency discretion, and I'd like to focus a little bit on the
16 *Heckler v. Chaney* case, because what happened in *Heckler*, that
17 was the case about the FDA choosing not to commence an
18 enforcement action. And what *Heckler* did was it drew a
19 distinction between those internal decisions of the agency, and
20 it made a contrast with that and actions that had a direct
21 concrete legal effect that could become a focus for judicial
22 review.

23 And so yes, the *Heckler* case did arise in a
24 nonenforcement context, but as Mr. Traskos said, the reasoning
25 of the Court was not so limited. The Court said that the reason

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1 that the decision in *Heckler* was unsuitable for judicial review
2 was because it involved enforcement decisions that involved a
3 complicated balancing of a number of factors that were within
4 the agency's expertise. And it specifically mentioned how
5 agency resources were spent, whether the agency felt it was
6 likely to succeed if it acted in a certain way, whether
7 enforcement best fit the agency's overall policies or advanced
8 its current priorities. And the decisions for those reasons --
9 that decision was traditionally -- was found to be traditionally
10 admitted to the agency's discretion.

11 THE COURT: Why wouldn't that mean that the *DACA*
12 decision -- shouldn't the *DACA* decision have come out the other
13 way, if that's the rule?

14 MR. ISLER: So, the *DACA* decision actually ducked that
15 argument by the Government. The Supreme Court said that it
16 didn't need to address that, because what was happening in
17 *Regents* was not just a nonenforcement case. What happened in
18 *DACA* was that there was a program that had been developed, and
19 the USCIS was directed to receive applications. I think it
20 was -- the number that was in the Supreme Court is from 700,000
21 people that they standardized a review process for that program,
22 and as a result of that, individuals were able to access
23 benefits.

24 So, the *Regents* case was not just about an internal
25 decision like what was being described in *Heckler*. And what is

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1 present in the 2021 and 2025 --

2 THE COURT: So, your view is that's kind of a
3 combination of the both internal policy governing your own
4 employees' assessment of things argument that we were just
5 talking about, coupled with this other issue regarding agency
6 discretion? Because aren't we talking about the same basic
7 issues that are committed to the agency to ICE and to Department
8 of Homeland Security in both cases?

9 MR. ISLER: That's right. The *DACA* program was
10 directed to people outside the agency. I mean, it was a program
11 for them to apply and potentially receive these benefits. That
12 makes a stark contrast with the memos here, just about
13 expressing this is going to be our approach to immigration
14 enforcement.

15 One factual point I would like to make on that is if
16 you trace the policy back from 1993 through 2025, the policy is
17 actually not the same. So, it's not quite accurate to say that
18 this policy has been in place for 30 years. Originally, it was
19 limited only to apprehension of aliens in the 1993 memo.
20 Different people could give different supervisory approval as
21 you chase those memos through time. And so, you know, that's
22 one other factor for the Court to consider when it's talking
23 about the reliance interests of DPS.

24 So, the other cases that DPS relies on for the agency
25 discretion is that the *Department of Commerce* case -- that --

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1 what happened there was the Supreme Court actually identified a
2 history of Courts making decisions about census-related
3 decision-making. And then it also looked at the Census Act
4 itself and found that in the statute, the -- that in the statute
5 itself, the statute provided a meaningful standard by which the
6 Court could review the census question.

7 It said that the Census Act actually created a duty to
8 accurately and fairly account for the representation rights that
9 depend on census apportionment, and so the decision to reinstate
10 the citizenship question could be reviewed under that standard.

11 They also point to the *Weyerhaeuser versus U.S. Fish*
12 *and Wildlife Services* case from 2018 of the Supreme Court.
13 There you had the Endangered Species Act, which itself contained
14 factors that the secretary was supposed to consider in
15 designating land a critical habitat or not. So, the statute
16 itself provided a guideline. And what we don't have in this
17 case is the meaningful standard that comes from congress to show
18 that this is the -- that this kind of decision was meant to be
19 constrained.

20 What the guidance memos don't do is share those
21 characteristics of the *Weyerhaeuser* and the *Department of*
22 *Commerce* cases. There's no legally binding definitive
23 adjudication of a plaintiff's rights. The guidance was not
24 presented as a playbook for other parties outside of the agency
25 to adjust their conduct. It didn't commit the agency or

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1 prohibit the agency from taking a specific illegal approach in a
2 particular case. It did not withdraw all employee discretion.
3 And so when you do not have that meaningful standard provided in
4 the statute, then those are the situations where the Supreme
5 Court and other Courts have recognized that those kinds of
6 decisions are meant to be left to the agency's discretion.

7 THE COURT: I guess I'm not entirely sure how to apply
8 those cases here. I mean, DPS is not arguing that substantively
9 your clients couldn't do essentially what they've done here.
10 They're making a pure kind of process argument about failing to
11 comply with the steps required under the APA. So, it's not so
12 much that they're saying you didn't live up to some standard
13 under the immigration code. So, I'm not totally sure how to
14 apply those cases to this kind of a challenge.

15 MR. ISLER: That's right. Courts have struggled with
16 that. What the Courts have done, even in APA cases, is said
17 that the reference for the meaningful standard still has to come
18 from the statute that the -- that the enforcement action was
19 authorized under. I can see if I have a --

20 THE COURTROOM DEPUTY: Counsel, five-minute warning.

21 MR. ISLER: Okay. Thank you. So, there still needs
22 to be that reference to what can it be reasonably assumed that
23 congress intended to do? And because there is -- there is no
24 guidance from congress incabining the law enforcement
25 discretion -- I mean, those are the very cases in which the

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1 agency has rein to come up with its own preferences for its
2 approach to the statutory powers that it enjoys.

3 THE COURT: Say I disagree with you. What do you
4 think would be required to survive the arbitrary and capricious
5 standard? What -- for this sort of a policy, what kind of thing
6 would you have to show was undertaken to make this kind of
7 change?

8 MR. ISLER: Right. So, the clarification that we got
9 and what we see in the complaint is that the arbitrary and
10 capricious claim here is about what reasons were provided for
11 the decision, not necessarily that the 2025 guidance itself is
12 arbitrary and capricious. DPS is not clear exactly what the
13 standards should be. They cite to a lot of cases that are about
14 formal rulemaking, or they are formal opinion letters that are
15 different in kind from the memos that we are talking about.

16 If you look at the *FCC versus Fox Television Stations*
17 case that is cited in some of the papers, I think what the
18 standard would be would be a rational explanation that the
19 agency's path -- that the decision should be upheld if the path
20 is reasonably discerned, and that the agency doesn't have to
21 demonstrate that one approach is -- the new approach is better
22 than the old one, just that it's permissible under the statute,
23 and there are good reasons for it.

24 I mean, normally, this kind of decision would be made
25 on the full administrative record, which we don't have at this

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1 moment. But I think you can see that under that approach, there
2 are reasons given for the change. Basically, both in the
3 Huffman Memo and the Vitello Memo, you see the agency saying,
4 you know, the work that our employees do involves the balancing
5 of difficult interests all the time, and so we don't think that
6 we need bright line rules in order for the employees to exercise
7 their discretion.

8 I mean, the 2025 policy does not in its terms jettison
9 the interests or say the new decision-making will not take into
10 account the kinds of interests that were applicable before.
11 What it says is that we don't think it's necessary for us to
12 create bright line rules, and so we are going to rely on the
13 expertise the -- the experience of our agents to carry out this
14 work in protected areas, which the ICE memo -- the Vitello Memo
15 still recognizes schools as protected areas.

16 So, I think that if you were to look at that rational
17 standard, that's what -- I think that it has been met in this
18 case.

19 THE COURT: And is the position of the Government that
20 the current memo requires at least some level of approval of
21 actions in protected places, particularly schools here, about
22 when to conduct an action? That it's not just whenever a
23 particular officer feels it's appropriate? Is that right?

24 MR. ISLER: So, according to the memos, that is
25 correct with respect to ICE. There are different components of

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1 DHS here. CPB [sic] did not issue its separate memo like the
2 Vitello Memo. The supervisory approval requirement is in the
3 ICE memo. But by way of example, I mean, the enforcement action
4 that happened at the Cedar Run apartment complex, that was run
5 by ICE, so that kind of decision would have been subject to the
6 2025 supervisory approval.

7 THE COURT: Do you think that the Cedar Run action
8 would have violated an injunction of this type had it been in
9 place at the time?

10 MR. ISLER: I think it's very difficult to say,
11 because of the discretion that's built into these memos -- if
12 you look at the 2021 memo, that says on itself -- on its face,
13 we are not defining what near a protected area means. It sort
14 of depends on a lot of different factors, whether it's visible
15 from the location or not. I think that if you're talking about
16 an apartment building that's more than half a mile from a
17 school, that -- you know, I think that probably would not have
18 been affected by an injunction here, because it was not in the
19 protected area.

20 The 2021 memo does have language about bus stops, but
21 of course DPS bus stops are not DPS property. They're not
22 marked as bus stops. And so I think that becomes a very tricky
23 element of defining what would be enjoined specifically, and
24 how -- and how the agency would be able to respect that when
25 you're talking about protected areas that don't have markers.

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1 THE COURT: All right. Thank you. Your time is up.

2 MR. ISLER: Thank you.

3 THE COURT: Ms. Mueller?

4 MS. MUELLER: I trust Ms. Rogers will tell me when to
5 stop talking.

6 THE COURT: I will tell you.

7 MS. MUELLER: Perfect. Even better. Okay.

8 Defendants touched on many things. I think I will start with
9 some standing arguments. As the Court noted, I don't think *U.S.*
10 *v. Texas* is applicable here for the reasons you note. It's a
11 nonenforcement policy and was specifically decided based on sort
12 of that nonenforcement and lack of any coercive action --

13 THE COURT: Isn't the principle -- well, two questions
14 about that case. Isn't the harm very similar to the harm you're
15 alleging here, that we have to do things we couldn't do, we
16 spent time and money and effort on things that are -- we
17 shouldn't have to do if the Government was following the law?
18 Isn't that harm basically very analogous?

19 MS. MUELLER: Potentially, I suppose, but I don't -- I
20 don't think the harm was the concern there. As defendants
21 noted, I don't think the Court questions the harm in and of
22 itself. I think the reasoning there was based on the judiciary
23 being unable to tell the executive to arrest more people as a
24 baseline. That was the decision there.

25 And so I just don't think it's applicable, because

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1 that's not what we're asking here. As for other standing issues
2 that defendants raised, they talked about *Clapper* and future
3 harm being insufficient, but *Clapper* of course was quite
4 distinctive from what we have here. There were, I believe at
5 least five steps in what the Court called a speculative chain of
6 possibilities that would lead to any harm, and it was only
7 future harm identified there. Of course here, DPS has
8 established that harm has already occurred.

9 THE COURT: Well, but it's -- but there is some
10 similarity, because as we've talked about, the harm caused is
11 not clearly directly related to the changes that you're asking
12 me to undo. I mean, in your own complaint, you attached a
13 document that shows that a -- that has, I don't know, four pages
14 of enforcement actions that took place in protected areas
15 under -- over a couple of years under the previous memo.

16 So, it's not true, as some of the declarations state,
17 that there was a guarantee that this could never happen. I read
18 the Chicago article -- the article about the action in Chicago,
19 the school administrator says explicitly, we have training about
20 precisely how to handle these situations, which suggests that
21 everyone kind of knew that it's possible that this could happen,
22 even under the prior memo.

23 So, isn't it -- isn't it hard for me to say, yes, all
24 of this will go away if I only issue this injunction, or even
25 any of it will go away? We can't say -- none of us here have

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1 been able to say whether I would have stopped the Cedar Run
2 action, which is the only thing that's been pointed to that's an
3 actual nonspeculative activity, and then we're speculating about
4 whether that would be even covered. So, I can't -- I couldn't
5 give anybody the certainty that you're asking for.

6 MS. MUELLER: Well, I think -- I do think *Clapper* is
7 quite different, because again, it's future. Here we already
8 have actual harm that has happened, and we do have traceability.
9 We have people saying this is exactly why I'm not sending my
10 kids to school, and *Yearly Meeting* found that to be sufficient.

11 THE COURT: See, I'm not sure I see a lot of that. I
12 see people saying I'm scared to send my kids to school. I agree
13 with that. But I don't see a lot of them saying, because I'm
14 afraid they're going to be swept up at school by ICE. What I
15 see is people concerned that while their kids are at school, the
16 parents might be separated from them, something like Cedar Run
17 might happen. I don't really see too many people saying, my
18 kids are going to be, like, legitimate with fears that my kids
19 are going to be detained while at school.

20 And if they do, isn't that just the kind of speculative
21 fear of future activity that *Clapper* and a long line of cases
22 say is not sufficient?

23 MS. MUELLER: I think we do have evidence of people
24 specifically saying -- I believe it's in Mr. Meyer's
25 declaration, parents saying my children have legal status, and

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1 yet I'm afraid to send them to school because of this policy. I
2 don't think you're going to be able to establish it; right?
3 There are people -- specifically Ms. Shaler attested that the
4 drop in attendance -- from her understanding, you know, the
5 significant drop in attendance is directly related to the 2025
6 policy. And again, those sorts of harms and the fears that
7 people are having, they're legitimate, especially in the context
8 of what this administration and defendants are saying they're
9 going to do.

10 So, I think there's nothing speculative about the harm
11 here, not speculative enough that should warrant, you know, a
12 denial of the injunction. *Clapper* involved, you know,
13 surveillance of international people, foreign individuals, and
14 to establish harm to the plaintiffs, it would have required
15 showing that, one, the Government decided to surveil those
16 particular people, that they would do so under the actual
17 challenged law as opposed to a different mechanism, that the
18 judge -- because there was some level with judicial review,
19 would approve that warrant, that the Government would succeed in
20 those interceptions, and that plaintiffs would be the ones on
21 the other end of the line at the time. So, that's the sort of
22 like speculative harm that's not allowed, that I don't think
23 applies here.

24 And knowing that my time is running short, I do also
25 want to address the organizational standing argument that

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1 defendants made. Under sort of a constellation of *Hippocratic*
2 *Medicine* and *Arizona Alliance* and *Havens*, I understand
3 defendants to say a diversion of resources is not enough, but
4 that's not all that's happening here. And *Havens* here is
5 instructive. I believe counsel said that the harm there was
6 because defendants had directly lied to employees of the agency,
7 but the -- what the Court really found was that as an effect of
8 defendants lying to individuals and doing this sort of racial
9 steering away from certain apartment complexes, that directly
10 interfered with the core function of the organization, which was
11 to provide counseling and referral services. I believe that's
12 analogous to what is happening here at DPS.

13 Counsel also mentioned a hypothetical that is talked
14 about in the *Hippocratic Medicine* case, where they -- the Court
15 says teachers in border states could sue to challenge allegedly
16 lax immigration policies. That hypothetical, I don't think this
17 Court should put much credence in. It's a hypothetical,
18 obviously, and it was raised in the context of the Court saying
19 what plaintiffs are asking us to do here is to create a new type
20 of standing, a doctor standing.

21 THE COURTROOM DEPUTY: Counsel, five-minute warning.

22 MS. MUELLER: Thank you. So, I think that
23 hypothetical is not any indication that standing doesn't exist
24 in a case like this. And in fact, again, I would point to
25 *Yearly Meeting* where that Court found the standing was

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1 established.

2 THE COURT: I mean, isn't it significant that that's a
3 RFRA case that involves harms to a congregation's religious
4 activities as opposed to what we have here?

5 MS. MUELLER: I don't think so. I don't read *Yearly*
6 *Meeting* that standing only applies because you're churches. The
7 harms there were quite similar. It was a decrease in attendance
8 which led to some funding issues, led to some sort of less
9 volunteers for the volunteer projects that they do, an effect on
10 communal worship service.

11 Those absentee issues are present in the education
12 context as well. Here, we have a frustration of the ability to
13 teach students, not only those who don't come because they're
14 scared, but maybe when they do show up, then they're behind,
15 teachers are distracted, the other students who have been all
16 along are bored, not engaged. There's plenty of similarities
17 between those harms that I don't think depend on it being in a
18 religious context.

19 THE COURT: How broad is that? I mean, what if
20 it's -- what if it's a business owner in a neighborhood near the
21 same apartment complex we've been talking about, who his
22 clientele has been decreased because people have left or they're
23 afraid to go out? Would a business owner have standing?

24 MS. MUELLER: In that, the way you presented it, it
25 sounds like a no. But I don't think that's what we have here

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1 either. It's not some sort of amorphous, you know, chilling
2 effect. It's to the extent there is a chilling effect, that --
3 the chill -- the people not arriving, I mean, that is what
4 interferes with --

5 THE COURT: Say he came in and said, my revenue is
6 down 50 percent since January 21st.

7 MS. MUELLER: I just believe that would make it more
8 difficult -- a more difficult traceability question. The
9 causation there seems more attenuated than it is here where we
10 have actual people telling us this is exactly why they're not
11 going to school. And we have, you know, DPS employees --

12 THE COURT: But again, I go back to, they're telling
13 you that, but what they're telling you is based on, at least in
14 large part, a misunderstanding of both previous -- the effect of
15 the 2021 memo, and I think to some extent the 2025 memo. There
16 hasn't been a single instance on school property that you've
17 presented me of this new policy resulting in someone doing
18 something that wouldn't have happened under the prior policy.

19 The examples we do have -- well, you have a number of
20 examples of false rumors of actions, and then you have examples
21 of things that happened a mile or so away from school. So, none
22 of these would have been prevented. And so the fears that
23 people have are based, as far as I can tell, largely on other
24 things, and on a misunderstanding of both the previous memo and
25 the current memo. Am I wrong about that?

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1 MS. MUELLER: I would say so in a practical way, yes,
2 because while I don't think DPS ever guaranteed to people that
3 there were would not be enforcement actions, and to the extent
4 that language was used in declarations, I don't think they mean
5 it in a legal sense. I think in practice, under the 2021
6 policy, there were no enforcement actions. Even the exhibit
7 that -- the report from ICE that was given to congress of
8 enforcement actions that had happened in sensitive locations,
9 none were in Denver. And, you know --

10 THE COURT: Right. So, none were in Denver before.
11 None have been in Denver after. So, I'm not doing anything.

12 MS. MUELLER: I'm not sure that none have -- that
13 that's true. I do think the Cedar Run apartment, given that it
14 specifically was blocking -- you know, was at a DPS bus stop, I
15 do think that is a different level, and a new level of
16 enforcement action that has not been seen.

17 THE COURT: So, what would you -- what would you --
18 say I today issued your injunction, and tomorrow something
19 identical to the Cedar Run thing happened. Would you then be
20 asking me to hold someone in contempt for violating my court
21 order if that happened again, despite the fact that we're all
22 having a lot of trouble figuring out if that's actually covered?
23 Would I then come in and have to do some kind of big analysis of
24 whether it applied or not?

25 MS. MUELLER: Hmm. You might not like this answer,

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1 but it depends. I think it would depend on -- if the order that
2 we got from this Court was what we asked for, which was a return
3 under the -- a return to the 2021 policy, and an immigration
4 action was taken without consideration of those factors or
5 without prior approval required there, then yes. I believe that
6 would be a violation of that injunction.

7 THE COURT: All right. I will give you a minute.

8 MS. MUELLER: Thank you. My last point is just to
9 return to final agency action, just to urge the Court to
10 remember the context in which we are operating, which is, one,
11 the APA creates a presumption of reviewability that this Court
12 should consider. It is also -- the APA also provides for
13 judicial review when plaintiffs have no other way to challenge,
14 no other recourse. And I'm unaware of what DPS would do other
15 than challenge this under the APA.

16 And I believe my last point will be to the extent
17 defendants rely on this memo as just a internal guidance, I
18 think is contrary to the purposes of the APA, and it is --
19 should not be a means to evade judicial review, especially in a
20 context where some iteration of this policy has been in
21 existence for decades.

22 THE COURT: Let me ask you two questions, quickly,
23 about that. Number one, are you aware of anyone ever having
24 been able to rely on the 2021 memo or any of those prior memos
25 for -- as a legally enforceable safe harbor or otherwise?

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1 MS. MUELLER: I am not.

2 THE COURT: All right. And then secondly, what would
3 DPS have done differently if -- DPS itself had done
4 differently -- what did it rely on -- how did it rely on the
5 previous memo?

6 MS. MUELLER: I mean, I think it relied on it to the
7 extent that it knew there were only certain circumstances when
8 this -- when immigration officials could be at school. So, that
9 gave the organization and its community a certain level of
10 security. I think that it has relied on it -- that I suppose
11 would be the main way, in that it -- knowing that, you know, or
12 presuming that many of its population are new-to-country or
13 might have concerns like this, it was able to tell families, but
14 not here, probably.

15 THE COURT: Okay. Thank you. Your time is up. Let's
16 take a 10-minute recess, and I will come back, and I think I
17 will try to announce my ruling.

18 (Recess at 3:27 p.m., until 3:37 p.m.)

19 THE COURT: All right. So, as I indicated, I do want
20 to give you my ruling from the bench today. I'm normally
21 reluctant to do that, because I prefer to give a more thorough
22 explanation of my thinking, but I think in this case, it's in
23 everyone's interest to have a decision sooner rather than later.
24 And my decision is that the extraordinary remedy of a
25 preliminary injunction is not appropriate here.

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1 That standard does require DPS to meet a very high
2 burden, particularly here, where in my view, they are seeking an
3 injunction that alters the status quo and would give them the --
4 all of the relief they would be able to attain at trial, but
5 even under the typical high standard for a preliminary
6 injunction, the plaintiff is required to show clearly and
7 unequivocally that they are entitled to the injunction.

8 They must show that they're substantially likely to
9 succeed on the merits, that they will suffer irreparable injury,
10 and that their injury outweighs the opposing party's potential
11 injury, and that the injunction is not adverse to the public
12 interest. In a case like this where the Government is opposing
13 the injunction, those third and fourth factors merge.

14 I focus my decision on the first, and then the third
15 and fourth factors. I do not think DPS has met its high burden
16 in this case.

17 I base this decision on a number of factual findings,
18 including that DPS does serve over 90,000 students, has a
19 diverse student body reflecting a cross section of the city and
20 the Denver community. It educates a number of students whose
21 families could be impacted by some form of immigration
22 enforcement. I agree that DPS has shown that there are real
23 confusion and concerns and fears among some portion of those
24 families, and they have shown that they are having to expend
25 time and effort to address those concerns.

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1 For example, I do understand that attendance is down
2 from last year, particularly in schools with high populations of
3 immigrant families. Teachers and administrators are having to
4 spend some portion of their time responding to these concerns
5 rather than other things they would otherwise do to advance
6 their core educational mission.

7 However, I do not think it has been shown how much if
8 any of those impacts are due to the actual change that's in
9 front of me here between the 2021 and 2025 memos on this issue,
10 as opposed to broader concerns about increased immigration
11 enforcement or misunderstandings about the scope of the
12 protections provided by these two memorandums.

13 For example, I do think that a number of the
14 declarations seem to be based on the idea that there was a
15 guarantee that there would be no enforcement action at DPS
16 properties under the prior memo. I think we have established,
17 and the Exhibit 9 to the complaint shows that that is not the
18 case. And I think the concern was that there would be no
19 limitations or no protections for schools necessarily, and that
20 under the new memo, that I think is an overstatement, and the
21 fact that there have been no actions on school property in the
22 time since the memo was released here, or as far as we know
23 anywhere else, highlights that fact.

24 I also find that if bus stops or school -- all schools
25 are included in the definition of protected area, as well as

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1 anywhere near them, then the entire city would be covered. And
2 so a literal reading of those concepts, I think, cannot sit
3 with -- cannot be matched with anyone's position.

4 So, under those facts, I do think that the plaintiff
5 has not shown that it's likely to succeed for at least two
6 reasons. First, I do not think it's likely that they will show
7 they have standing to challenge this particular change in the
8 law. For the most part, the harms caused here are harms that
9 are indirect. Those harms would be to individuals who actually
10 would be subject to an enforcement action, potentially on DPS
11 property.

12 I don't rely too heavily on *U.S. versus Texas*, other
13 than to recognize that it recognizes the general proposition
14 that standing is a personal inquiry. People generally -- or
15 entities don't generally have the right to assert standing on
16 behalf of others. I also think that much of the injury relied
17 on here by DPS is speculative based on fears of future action,
18 as the Government argued, that those kinds of harms are
19 typically not enough in this.

20 There is a concrete fear or a concrete belief that
21 enforcement is actual or imminent. I think that we've heard of
22 enforcement fears that are based on mistaken reports or are
23 based on actions that took place elsewhere, and they're based
24 largely on broader immigration enforcement policy changes that
25 wouldn't be affected by anything I do here today.

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1 So, both those injuries I think for those reasons are
2 not fairly traceable to the action being challenged here. For
3 the similar reasons, I don't think that they would be redressed
4 here. I could not undo anything other than the narrow
5 differences between these two memoranda. Both involve
6 significant amounts of discretion pursuant to its own terms.
7 The 2021 memo, both in its definition of protected areas and its
8 explanation of when enforcement action could take place in those
9 areas stressed that the examples were not complete lists, were
10 only examples, and that discretion and judgment would have to be
11 enforced.

12 That is similar if not the same as what's being said
13 now. The level of where approval for certain actions would have
14 to take within the bureaucracy may have changed, but I don't
15 think that would alter any of the harms that have been presented
16 here.

17 And so that change does not -- would not redress any of
18 the harms that the plaintiffs have shown would take place here.
19 I think that the fears -- the understanding that some people had
20 about prior protections and their understanding about the
21 current situation both seem to be overstated. I certainly
22 understand some statements about current enforcement may have
23 given rise to some of those fears, both from -- people on both
24 sides of the issue perhaps have an incentive to overstate how
25 significant the changes have been, but legally, the change is

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1 not as significant.

2 Maybe more importantly, the actual facts shown are that
3 there were some enforcement actions at or near schools under the
4 prior memorandum, and there have been none, at least in Denver
5 Public Schools under the current, unless you take an extremely
6 broad reading of the Canyon Run [sic] enforcement action, which
7 I don't think would fairly fit within the definition of the 2021
8 action. And certainly for purposes of today, we could never get
9 to a clear understanding of whether that would be prohibited
10 under the 2021 memo, and that means -- that uncertainty is held
11 against the plaintiffs, given their heavy burden.

12 For similar reasons, I think that the actual harms
13 caused by the legal action being challenged here are not as
14 severe, and would not be fixed and redressed in the same way
15 that the plaintiffs suggest. The actual harms that they're
16 suffering, I do think they have shown some actual harm, but as I
17 said before, most of that actual harm, I think, comes from
18 elsewhere, from broader policies, broader statements that would
19 not be affected by anything we do here today.

20 So, the harm that would be avoided by entering an
21 injunction is not as significant as the plaintiffs have
22 alleged -- have claimed. On the other side, there are multiple
23 harms to a Court getting involved in a situation like this. As
24 Mr. Traskos pointed out, there is multiple areas that the
25 Supreme Court has been very clear that lower courts, federal

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1 courts have to be very careful about interfering with that are
2 at play here. Those include immigration enforcement in
3 particular, and getting involved in internal policy making.

4 So, I do think that the public interest would be harmed
5 by a federal court seeking to overturn immigration policy in
6 this way in this case, and the idea of me, one federal judge,
7 overseeing even just the Denver -- enforcement around Denver
8 schools, we got into some of the dangers about how that would
9 play out when the next enforcement at an apartment complex that
10 happens to be near a school would be very difficult to figure
11 out, let alone if I were to agree with the plaintiffs and enter
12 a nationwide injunction.

13 I think that those harms to the public interest
14 outweigh the more limited harms that changing the policy back
15 would be -- would outweigh those other harms.

16 So, since it's the plaintiff's burden to satisfy all of
17 the elements of the standard for all of the factors for a
18 extraordinary remedy of a preliminary injunction, I don't need
19 to address the other factors, and I do not. So, the motion is
20 denied. And I appreciate everyone's time and efforts. I do
21 understand the importance of this issue to everyone and
22 appreciate the excellent lawyering that you presented on both
23 sides. If there's nothing else, the Court will be in recess.
24 Thank you.

25 (Proceedings concluded at 3:51 p.m.)

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REPORTER'S CERTIFICATE

I, KEVIN P. CARLIN, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true, and correct transcript.

Dated this 14th day of March, 2025.

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Kevin P. Carlin, RMR, CRR
Official Court Reporter